

The first Federal complaint (11 Civ. 5802) was filed in the U.S. District Court, Eastern District of New York (Spatz, J.) (Tomlinson, M.J.) by a sole plaintiff Genometrica Research, Inc., alleging 13 state court claims with only three federal claims for alleged Trademark Infringement against the defendants Vera Gorfinkel ("Vera"), Boris Gorbovitski ("Boris") and ABMM Corporation ("ABMM"). A motion to dismiss was brought by the defendants Vera, Boris and ABMM under Federal Rules of Civil Procedure 12(b)(6). Defendants' dismissal motion alleged there was no Federal Question raised as no Trademarks existed in favor of plaintiff therefore the Court lacked subject matter jurisdiction. Plaintiff Genometrica Research, Inc. Amended its complaint to remove the three (3) trademark causes of action and replaced them with three (3) federal unfair competition claims numbered 3rd, 4th and 5th and one patent infringement new claim #2 under 35 USC 271 and left the 14 state law claims numbered 6th through 20th, #18 was dismissed as it contained no text. In or about January 29, 2013 Judge Spatz decided the Second Motion Rule 12(b)(6) dismissal motion of defendants, dismissed two of the Federal Unfair Competition Claims 3rd and 4th thereafter the defendants answered asserting detailed and complete affirmative defenses.

In the Supreme Court Suffolk County case No. 11-34172 following the decision and order of Judge Spatt on or about January 29, 2013, Vera Gorfinkel served and filed a Verified Complaint on April 26, 2013 and thereafter an Amended Verified Complaint on May 3, 2013.

Prior to filing the instant Notice of Removal, Genometrica's counsel moved before Justice Ralph T. Gazzillo to dismiss the Amended Complaint, Gorfinkel opposed the Dismissal Motion and made a cross-motion under CPLR 3211(e) to permit an expedited trial in State Court or in the alternative to permit the State Court judge to determine if removal or immediate trial was appropriate.

The motion and cross-motion were both made returnable for May 30, 2013 then administrative adjourned to June 13, 2013 then submitted for determination on June 13, 2013 marked *sub judice* for determination by Justice Gazzillo.

Although referenced as Exhibit "J", para. 20 omitted from the Notice of Removal is a complete copy with exhibits of the dismissal motion brought by the four defendants returnable on May 3, 2013 and administratively adjourned and submitted for determination on June 13, 2013. It is fatal to a removal petition to omit from the record the dismissal motion under review.

II. Argument

Vera Gorfinkel, the plaintiff in the state court action respectfully submits her State Court action Supreme Court Suffolk County Index No. 11-34172 is not removable.

A notice of removal may be filed within thirty (30) days after receipt by the defendant through service or otherwise, of a copy of original pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. That occurred with service of the complaint on April 26, 2013, filing a notice of removal on May 28, 2013.

It is obvious that the defendants knew they were served with legal process, a responsive pleading on April 23, 2013 as the defendants counsel did not file removal but elected a different remedy, dismissal of the April 23, 2013 complaint under CPLR 3211 returnable for May 3, 2013, adjourned administratively to May 31, 2013 then submitted on June 13, 2013 for decision by Justice Gazzillo, fully briefed by both sides. Vera Gorfinkel alleges a lack of subject matter jurisdiction because the motion for removal in the EDNY begins on June 14, 2013 only after Justice Gazzillo takes the dismissal motion fully briefed for adjudication.

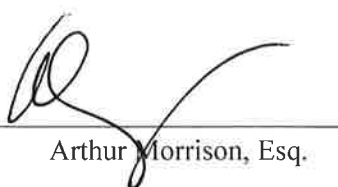
For all of the reasons detailed herein, Vera Gorfinkel opposes the Notice of Removal and requests the Court to grant her motion to remand case to state court. Also the sole patent issue is patent infringement (claim #2). Defendant will withdraw her last cause of action in state court seeking declaratory judgment thereby terminating any state court issue of patent infringement.

Dated: New York, New York
June 27, 2013

Respectfully Submitted,

For the Plaintiff:

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